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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1949.

No. 272

GLEN S. DILLE, *Petitioner,*

vs.

THE CARTER OIL COMPANY, A CORPORATION; W. A. DELANEY, JR.; AND ZEPHYR DRILLING COMPANY, A CORPORATION, *Respondents.*

RESPONSE OF W. A. DELANEY, JR., AND ZEPHYR DRILLING COMPANY TO PETITION FOR WRIT OF *CERTIORARI.*

To the Honorable Fred M. Vinson, Chief Justice, and Associate Justices of the Supreme Court of the United States:

May It Please the Court:

The respondents, W. A. Delaney, Jr., and Zephyr Drilling Company, a corporation, herewith present their response to the petition for certiorari of Glen S. Dille filed in the above styled and numbered cause.

I.

Statement of Case.

This proceeding is a companion case to No. 190, now pending before this Honorable Court, wherein the same parties are named as petitioner and respondents, and wherein the petitioner, Glen S. Dille, has applied for a writ of certiorari to review the decision in *Delaney, et al.*, v. *Carter Oil Company, et al.*, 174 F. (2d) 314, decided by the United States Court of Appeals for the Tenth Circuit on April 15, 1949, rehearing denied May 18, 1949. In that case, the Court of Appeals held that the requisite diversity of citizenship existed and that the trial court had jurisdiction to hear the case, and Dille seeks to have this court review the decision by *writ of certiorari*. In this case, Dille seeks to have this court review the order of the trial court, affirmed by the Court of Appeals, which ordered certain witnesses to give their depositions while the case was pending in the trial court. It is interesting to note in passing that Dille is represented by a member of the Bar of this Court in No. 190 while the petition in this case is signed by the Petitioner *pro se*. If the petition for *certiorari* is denied in case No. 190, the issue involved in the instant proceeding becomes moot, since such denial of the writ in the other case would result in an affirmance of the holding of the Court of Appeals that the District Court had jurisdiction. Having such jurisdiction, the trial court obviously had full power and authority to order the witnesses to give their depositions. Accordingly, if the petition in No. 190 is denied, it should also be denied in the instant case.

However, even assuming that the District Court was without jurisdiction, the petition herein should be denied.

The issues and principles of law involved are so well established that this response is filed only for the purpose of answering the charges of tyranny, duress, capriciousness and oppression contained in the petition and supporting brief.

The statement of the case as contained in the petition is not entirely objective, and we desire to point out to the Court the following facts:

After the complaint was filed and the respondents, Delaney and Zephyr Drilling Company, had answered, subpoenas *duces tecum* were served upon Dille and Don C. Matthews on June 29, 1948, commanding them to appear on July 6, 1948, for the purpose of taking their depositions (R. 28-31) On July 6, 1948, Dille and Matthews appeared and refused to answer the questions propounded to them. (R. 46, 53) Dille objected to the taking of the depositions, solely upon the ground that it was not thought that the court had jurisdiction and that if the witnesses were permitted to answer the jurisdictional defect would be waived. (R. 46-47, 50, 61-62) At that time, Dille had not yet filed a motion to dismiss or any other pleading, although such a motion was filed later in the day, *after* the refusal of the witnesses to testify and after the court had indicated that he would direct the witnesses to testify. (R. 47-49, 54)

A hearing was had upon the matter and the witnesses were ordered to testify. The petitioner appealed to the Court of Appeals for the Tenth Circuit. As shown in the transcript of the record filed in the companion case in this Court, No. 190, the depositions of the witnesses were taken after the court made the order complained of so that the question is now moot. The District Court thereafter dismissed the action upon the ground that no justiciable con-

troversy existed between the plaintiff, Carter Oil Company and the defendant (petitioner herein), Dille. Delaney and Zephyr appealed and the Court of Appeals reversed the District Court on the ground that a justiciable controversy existed (174 F. (2d) 314). Dille's appeal from the order of the trial court directing him to submit to the depositions was dismissed on the ground that such an order is not a final order or judgment from which an appeal may be taken. (R. 95) The opinion of the Court of Appeals appears in 174 F. (2d) 318. The petition and supporting brief make numerous references to the questions of diversity of citizenship, alignment of parties and jurisdiction of the subject-matter. These questions have no application to the instant proceedings.

II.

Questions Presented.

The question presented is not, as we see it, whether a Federal court has power to invoke coercive remedies in a cause without first determining whether it has jurisdiction. If coercive remedies had been invoked, such a question might be presented. However, the court merely ordered the witnsses to answer the questions to be asked on the taking of the depositions. If the witnesses had refused to answer and contempt proceedings had been initiated, the jurisdictional question might need to be decided at that time. Such remedies were not invoked, since the order was obeyed and, therefore, the question presented is not that as stated by petitioner. There is no question of due process, "oppression," "tyranny" or "unlawful search and seizure" involved. Virtually all orders of the courts are strengthened by the fact that disobedience might result in some penalty.

Without such remedies, the judicial power would be emasculated. Under the petitioner's reasoning, any order of court could be characterized as tyrannical, oppressive, and a denial of due process, merely because there lurks behind the order the power to punish for disobedience.

Actually, the question presented is this, Is an order directing a witness to submit to a deposition an appealable order? Collateral or subsidiary questions are: *First,* does a court have power to issue orders in the orderly administration of justice, even though it may subsequently determine that the case is not properly before it; *second,* whether depositions may be ordered even though the court has not passed upon a pending objection to its jurisdiction; and *third,* whether a refusal to submit to a deposition is a proper way of raising an objection to jurisdiction.

III.

The Writ Should Be Denied.

The petitioner characterizes the ruling of the trial court and the Court of Appeals as a violation of certain constitutional rights and attacks the ruling as being tyranny, denial of due process, unlawful search and seizure, arbitrary and oppressive. The real issue is never squarely met.

These respondents respectfully submit that the petition for writ of certiorari should be denied because the order appealed from is not a final order or judgment from which an appeal may be taken; because the question is moot, the depositions having been taken; because an order to a witness to submit to depositions can be made even though the court is later found to be without jurisdiction; and, if the writ of certiorari is denied in Case No. 190, now

pending before this Court, the question herein involved is necessarily determined adversely to petitioner.

Respectfully submitted,

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BRIEF IN SUPPORT OF RESPONSE TO PETITION FOR WRIT OF *CERTIORARI*.

I.

Statement.

The opinions of the courts below are referred to in the petition for the writ of certiorari and the response thereto.

The statements of the case and questions involved contained in the petition and response are incorporated herein by reference. Further development of the facts will only be made as may be necessary in setting forth the argument.

II.

Argument.

As stated in the response, the questions herein involved are so well settled that little citation of authority is needed. Accordingly, we do not propose to extend the brief any longer than is necessary to meet the argument advanced by the petitioner.

Proposition I.

An order directing a witness to submit to a deposition and to comply with a subpoena *duces tecum* is not a final order or judgment from which an appeal will lie.

The Court of Appeals based its decision upon the well-established rule that an order relating to the taking of depositions or subpoenas is not an appealable order and, accordingly, dismissed the appeal. No extensive citation of authority is necessary to show that the action of the Court of Appeals was entirely correct. Among the cases holding

that the order here complained of is not a final order from which an appeal may be taken, attention is directed to *Webster Coal & Coke Company* v. *Cossatt,* 207 U. S. 181, 28 S. Ct. 108, 52 L. ed. 160 (1907); *Cogen* v. *United States,* 278 U. S. 221, 49 S. Ct. 118, 73 L. ed. 275 (1929); *Doyle* v. *London Guarantee & Accident Co., Ltd.,* 204 U. S. 599, 27 S. Ct. 313 (1907); *Goodyear Tire & Rubber Co., Inc.,* v. *Jamaica Truck Tire Service Co., Inc.,* 66 F. (2d) 91 (C. C. A. 7, 1933), certiorari denied, 290 U. S. 700, 54 S. Ct. 209; *Apex Hosiery Co.* v. *Leader,* 102 F. (2d) 702 (C. C. A. 3, 1939); *Thomas French & Sons* v. *International Braid Co.,* 146 F. (2d) 735 (C. C. A. 1, 1945); *National Nut Co. of California* v. *Kelling Nut Co.,* 134 F. (2d) 532 (C. C. A. 7, 1943); *United States* v. *Tinhoff,* 153 F. (2d) 106 (C. C. A. 7, 1945).

An excellent discussion of the reason for this rule is found in the opinion in *Cobbledick* v. *United States,* 309 U. S. 323, 60 S. Ct. 540, 84 L. ed. 783 (1940), wherein this Court stated that orders relating to subpoenas *duces tecum* are not appealable in order that "piecemeal disposition on appeal of what for practical purposes is a single controversy" be avoided. The court further states:

> "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."

Apparently the petitioner has no quarrel with the general rule, but takes the position that in the instant case the ruling deprived him of certain constitutional rights. The *Cobbledick* case also answers this contention, for it states that the correctness of a trial court's rejection even of a constitutional claim made by an accused in a *criminal* case must await conviction before an appeal can be taken. The vice of multiple appeals is well illustrated in this case where pe-

titioner is appealing from the decision of the Court of Appeals in No. 190 and is appealing from an order to submit to depositions in this case. Conceivably this procedure might be extended by appealing from any number of orders which are entered in the course of the trial and ancillary proceedings.

Petitioner places great emphasis upon the fact that the order was coercive and oppressive since the court could punish for contempt in the event of disobedience. Such contempt power lies behind every order of court—upon such power rests the judicial strength. In *Alexander* v. *United States*, 201 U. S. 117, 26 S. Ct. 356, 50 L. ed. 686, witnesses were directed to appear and produce documents. Upon their refusal to comply, an order of compliance was issued, whereupon an appeal was taken. Upon dismissing the appeal, the court stated:

> "* * * And such an order may coerce a witness, leaving him no alternative but to obey or be punished * * *. Let the court go farther, and punish the witness for contempt of its order—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case * * *."

Petitioner appealed from the order prior to dismissal of the case by the trial court. The sole purpose, it is submitted, was an attempt to get an early ruling upon the question of jurisdiction. Such an appeal, under the above cases, is premature, and if allowed, would impede the orderly administration of justice and the adjudication of rights of parties. The Court of Appeals was entirely correct in dismissing the appeal, and the writ of certiorari should be denied.

PROPOSITION II.

A court has power to order depositions to be given even though an objection to its jurisdiction is pending.

The Court of Appeals has decided that the trial court had jurisdiction over the subject-matter. Certiorari has been applied for from that ruling in No. 190, and, if the writ is denied, the question herein presented will be disposed of. However, petitioner has taken the position that the trial court had no power nor right to order the depositions until it had decided the question of jurisdiction. Such an argument could be made against any act or order of court. Under such reasoning it could be asserted that the court has no right to order the clerk to accept and file a pleading, because the jurisdiction has not been obtained; or, even, that the court has no jurisdiction to determine its own jurisdiction. As a matter of practice, orders and rulings are frequently made and the court later determined to be without jurisdiction—yet it is absurd to state that all such orders and rulings are therefore void.

The Federal Rules of Civil Procedure, both in letter and in spirit, are designed to permit fullest discovery and disclosure of our opponent's case. Petitioner, apparently, is quite determined that such will not be the case here, for he is availing himself of every device in order to suppress the evidence which is germane to his case. The depositions have already been taken, and the harm, if any, already done. The statement is made that the various papers offered in evidence as a part of the depositions have been taken from petitioner, and he is thus deprived of their use in connection with the various proceedings in the State and Federal courts. This is not true. Copies of the deposition and all the papers obtained by the subpoena *duces tecum*

have been furnished or are available to all the parties. If need arose, permission of court to withdraw some of the papers could undoubtedly be obtained.

That depositions may be ordered prior to a determination of the jurisdictional question is borne out by a study of Rule 26 of the Federal Rules of Civil Procedure. As originally written, this rule provided that depositions could be taken,

> "By leave of court after jurisdiction has been obtained *over any defendant* or over property which is the subject of the action * * *." (Emphasis ours.)

The rule contemplates the taking of depositions once jurisdiction of the person attaches. No requirement is made that there be jurisdiction of the subject-matter (*i. e.*, the requisite diversity of citizenship and jurisdictional amount), but only that the parties have been served and are before the court. If depositions were to be taken only after the question of jurisdiction of the subject-matter had been determined, the rule would have provided that such jurisdiction be first obtained. Throughout the Rules of Civil Procedure, careful distinction is made between jurisdiction over the person and jurisdiction of the subject-matter, yet in Rule 26, no mention is made of jurisdiction of the subject-matter as a prerequisite to the taking of depositions. As amended, the rule no longer even requires that there be jurisdiction of the person. The only conclusion which can be drawn is that depositions may be ordered, without a prior determination of the jurisdictional question.

Rule 27 authorizes the taking of depositions before actions are even commenced, and jurisdiction thus attached. Here again is an example of the objective sought to be achieved by the rules, *viz.*, full discovery and disclosure of the evidence.

Ofttimes it is necessary for depositions to be taken in order to decide whether the court has jurisdiction. The courts have uniformly held that the power to order such depositions exists. See, *e. g., Urquhart* v. *American-La-France Foamite Corp.*, 144 F. (2d) 542 (App. D. C., 1944) certiorari denied, 323 U. S. 783, 65 S. Ct. 273; *Kilpatrick* v. *Texas & P. Ry. Co.*, 72 F. Supp. 635 (S. D. N. Y., 1947); *Richardson* v. *North American Clay Co.*, 41 F. Supp. 528 (S. D. N. Y., 1941).

In *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 63 S. Ct. 339 (1943) affirming 128 F. (2d) 208 (C. C. A. 2, 1942) it was held the Secretary of Labor was entitled to the enforcement of the subpoena power in order to obtain evidence, even though the question had been raised and there had been no determination that the matter came under the Walsh-Healey Act and therefore under the jurisdiction of the Secretary of Labor.

The argument petitioner makes herein is reminiscent of the argument made in *United States* v. *United Mine Workers*, 330 U. S. 258, 67 S. Ct. 677 (1947), wherein it was held that a court has the power to issue orders which must be obeyed, no matter how erroneous such orders might be.

Proposition III.

Objection to the taking of depositions is not the proper manner in which to raise the jurisdictional question.

At the time the depositions were to be taken, petitioner had not yet filed a responsive pleading or motion. The parties had assembled, the services of a reporter obtained, and arrangements concluded. Without prior notice, objection to the taking of the depositions was made solely by refusal of the witnesses to answer questions upon the ground

that if allowed to be taken, petitioner might waive the jurisdictional objection. (R. 46-47, 50) Petitioner was not concerned so much with the right of the parties to take the depositions as he was with the fear that unless he made some objections the jurisdictional question might be waived —and this despite the statement by the court that such a jurisdictional defect is never waived. It is well settled that objections to jurisdiction of the subject-matter are never waived, and Rule 12(b) of the Federal Rules of Civil Procedure so provides.

After the court had announced his ruling, but prior to the time (later the same day) that a formal application and order was presented to the court for signature, petitioner filed his motion to dismiss, and demanded an immediate hearing upon the jurisdictional question. Such procedure was entirely unjustified, and the court did not abuse its discretion in ordering that the taking of the depositions be proceeded with, and the motion to dismiss argued and decided upon the next regular motion docket.

In *Davis* v. *Shackleford,* 91 F. (2d) 148 (C. C. A. 8, 1937) it is stated:

> "It is true, as contended by appellee, that want of jurisdiction may be raised in the Federal court at any stage of the proceedings * * *. But the question must be raised 'in some appropriate mode'."

We submit that the method pursued by petitioner—that is, refusal to answer questions propounded on the taking of depositions—was an improper manner in which to raise the jurisdictional question. No prior notice was given, although petitioner had been served with the subpoena one week before. The prescribed time for filing an answer or motion had expired. Certainly the court was justified in permitting the depositions to be taken at the scheduled time.

PROPOSITION IV.

The Question Is Moot.

As stated above, the depositions of the witnesses were actually taken after the order complained of had been made and a portion of these depositions is set out in the printed transcript of the record filed in No. 190 herein. Regardless of whether the order was properly entered, the admissions of the witnesses, Glen S. Dille and Don C. Matthews, have been obtained and would be admissible as admissions against Dille and for the purpose of impeachment of the witness Matthews. Under such circumstances, the question of whether the depositions were properly taken is certainly moot at this time.

We think the above adequately answers the questions of law attempted to be raised by the petitioner in the brief filed *pro se*. We call attention, however, to the fact that the filing of this document is in violation of Rule 38, subdivision 3 of this Court, which requires that a brief bear the name of a member of the Bar of this Court at the time of filing. We can only assume that petitioner's counsel refused to sign this brief since the brief in the companion case is signed by a member of the Bar of this Court.

Also, we do not like to conclude our statement on this matter without refuting the intemperate language of the petitioner's brief as applied to the trial judge. The petition, at page 5, contains the following language:

> "* * * The trial court said in effect that it made no difference to him—that Dille should testify and surrender his records, or go to jail, or pay a fine
>
> "This constitutes tyranny * * *."

We challenge the record with reference to the foregoing statement. On the contrary, the record, at pages 46 to 64, shows that the trial court very deliberately and patiently explained to the petitioner and his counsel that he should not attempt to raise the question of the court's jurisdiction by refusal to answer questions on advice of counsel. The record shows that the subpoena *duces tecum* had been served a week previously and no objection had been made thereto until the parties were assembled for the taking of the depositions, with some of the attorneys present from a long distance away. Even then no objection was addressed to the court as to the taking of the depositions, but the witnesses simply refused to answer on advice of counsel. In the language quoted at page 5 of the petition, the court was merely paraphrasing Rule 37 of the Federal Rules of Civil Procedure, which states that a refusal to comply with an order to answer questions "may be considered a contempt of that court."

We call attention to the full statement of the court as contained on pages 62, 63 and 64 of the record, and we submit that only a litigant—certainly not a lawyer—could make the assertion that "this constitutes tyranny." On the contrary, we submit that the trial court took great pains to observe all the proprieties of judicial decorum in a situation which might easily have justified more abrupt handling.

The respondents, W. A. Delaney, Jr., and Zephyr Drill-

ing Company, earnestly submit that the petition for certiorari should be denied.

Respectfully submitted,

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Of Counsel:

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Conner, Winters, Lee & Randolph,
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CERTIFICATE OF SERVICE.

I hereby certify that on the ... day of September, 1949, I served a copy of the within brief on Glen S. Dille, petitioner herein, and F. M. Darrough and Garrett Logan, attorneys of record for the respondent, The Carter Oil Company, by mailing copies of the above and foregoing response and brief to each of said named parties at the addresses shown of record for them, as follows:

Glen S. Dille, Atlas Life Building, Tulsa Oklahoma;

F. M. Darrough, c/o The Carter Oil Company, National Bank of Tulsa Building, Tulsa Oklahoma;

Garrett Logan, National Bank of Tulsa Building, Tulsa, Oklahoma.

Dated this ... day of September, 1949

.....,
Gentry Lee.